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IN THE

SUPREME COURT OF THE UNITED STATES

"OCTOBER TERM, 1977"

NO. 76-1488

JOE JACOBSON,

Appellant.

VS

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, the Mayor of the City of Tucson; DONALD L. DeMENT, City Clerk of the City of Tucson; RUBEN ROMERO; RICHARD J. KENNEDY; ROBERT C. CAUTHORN; EMMETT McLOUGHLIN; RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Council of the City of Tucson,

Respondent.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of Arizona is reported at ___ Ariz.___, 558 P.2d 686 (1976) and is set forth in Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. §1257(2), this being an appeal which draws into question the validity of Resolution Number 9502 of the Tucson City Council, Rule I, Mayor and Council Rules and Regulations adopted pursuant to Tucson City Charter, Chapter IX, Sec. 4, and Tucson City Charter Chapter XI Sec. 8, on the grounds that they are repugnant to the Constitution of the United States.

Appellant was appointed City Magistrate of the City of Tucson on April 28, 1975, by Resolution Number

#9496, (set forth in Appendix B), which had no emergency clause, but which provided that Appellant was appointed for the term commencing April 29, 1975 to and including April 28, 1977. On May 2, 1975, Appellant was notified of his appointment by letter (set forth in Appendix C). On May 5, 1975 the City Council attempted to repeal or rescind Resolution No. 9496, by passing Resolution No. 9502, (set forth in Appendix D). On May 7, 1975, Appellant was notified by letter (set forth in Appendix E), from Respondent DeMent, that his appointment had been rescinded. On May 19, 1975, the City Council took a second vote and readopted Resolution Number 9502 with an emergency clause. Appellant petitioned to the Superior Court of Pima County under a Special Action for a Writ of Mandamus, which

the Superior Court granted. Respondents herein appealed to the Court of Appeals on November 15, 1975. The Court of Appeals, pursuant to the Rules of the Supreme Court of Arizona, Rule 47 (e)(2), petitioned to transfer the appeal to the Supreme Court of Arizona on March 16, 1976. The Supreme Court of Arizona granted the petition for transfer on March 26, 1976. On November 29, 1976, the Supreme Court of Arizona handed down its decision reversing the judgment of the Superior Court. On January 4, 1977, a Petition for Rehearing was denied. Timely notice of appeal to this Court was filed in the Supreme Court of Arizona on March 7, 1977. (Set forth in Appendix I). Inasmuch as the Supreme Court of Arizona rejected Appellant's constitutional challenges to Resolution Number 9502 of the Tucson City

Council, Rule I, Mayor and Council Rules and Regulations, adopted pursuant to Tucson City Charter, Chapter IX, Sec. 4, and Tucson City Charter Chapter XI, Sec. 8, all ordinances considered "state statutes" for purposes of appeal, this matter is appropriately brought to this Court by appeal. See, eg., Zucht v King, 260 U.S. 174 (1922); Atlantic Coast Line Railway Company v. Goldsboro, 232 U.S. 548 (1912); Reinman v. Little Rock Arkansas, 237 U.S. 171 (1915); United States v. Ballin, 144 U.S. 1 (1841).

In the event that the Court does not consider appeal the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to 28 U.S.C. §2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case specifically involves Resolution Number 9502 of the Tucson City Council adopted May 5, 1974 without an emergency clause and readopted May 19 with an emergency clause:

"RESOLUTION NO. 9502

RELATING TO APPOINTMENT OF CITY COURT MAGISTRATES: REPEALING RESOLUTION NO. 9496 OF THE MAYOR AND TUCSON CITY COUNCIL.

WHEREAS, on April 28, 1975, the Mayor and Council of the City of Tucson passed Resolution No. 9496 appointing a City Court magistrate,

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF

TUCSON, ARIZONA, AS FOLLOWS:

SECTION 1. That Resolution No. 9496 be and is hereby repealed.

~~SECTION 2. WHEREAS, it is necessary~~ for the preservation of the peace, health and safety of the City of Tucson that this resolution become immediately effective, an emergency is hereby declared to exist, and this resolution shall be effective immediately upon its ~~passage and adoption~~.

PASSED, ADOPTED AND APPROVED by the Mayor and Council of the City of Tucson, Arizona, May 5, 1975."

This ordinance or resolution deprived Appellant of his rights to notice and an opportunity to be heard, in violation of his constitutional rights to due process and equal protection, prior to removal from his appointive office.

This case also involves Rule I, Mayor and Council Rules and Regulations adopted pursuant to Tucson City Charter Chapter IX, Sec. 4:

> "When a motion has been made and carried or lost, it shall be in order for any member who voted with the prevailing side on the same or succeeding meeting day to move for reconsideration thereof."

This ordinance or regulation allowing reconsideration of Appellant's appointment to the office of City Magistrate without notice to him or an opportunity to be heard violates his constitutional right to due process of law.

This case also involves Tucson City Charter Chapter XI, Sec. 8, which provides:

> "All ordinances, resolutions or franchises shall be signed by the Mayor and attested by the clerk, and transcribed in the proper books therefor, but no ordinance,

> resolution or franchise shall take effect and become operative until thirty days after its passage, except measures necessary for the immediate preservation of the peace, health or safety of the city but no such emergency measure shall become immediately operative unless it shall state, in a separate section, the reasons why it is necessary that it should become immediately operative, and be approved by the affirmative vote of five-sixths of the council, taken by ayes and noes; provided further, that all ordinances and resolutions having the effect of ordinances or required to be published, except emergency ordinances and resolutions, shall be published at least three consecutive times in the official news-

paper of the city, and a copy thereof posted on a bulletin board in front of the City Hall, before they become effective and operative."

QUESTIONS PRESENTED

Does Resolution Number 9502 of the Tucson City Council repealing Appellant's appointment to the Office of City Magistrate of the City of Tucson, without either notice to Appellant or opportunity for Appellant to be heard violate the Due Process Clause of the Fourteenth Amendment?

Does Rule I, Mayor and Council Rules and Rules and Regulations (1968), adopted pursuant to Tucson City Charter Chapter IX, Sec. 4, which allows repeal of ordinances, franchises and resolutions, without notice or an opportunity to be heard as applied to resolutions removing City Magistrates, violate the Due Process Clause of the Fourteenth Amendment?

Does Tucson City Charter, Chapter XI, Sec. 8, allowing imposition of an emergency clause, in the resolutions appointing and removing City Magistrates, as applied to the facts of this case, violate the Equal Protection Clause of the Fourteenth Amendment?

S T A T E M E N T

Appellant, Joe Jacobson, was appointed to fill the vacancy created by the resignation of Judge Brashear, to the Office of City Magistrate on the 28th day of April, 1975, by the Tucson City Council, pursuant to the Tucson City Charter by Resolution No. 9496. Resolution No. 9496, passed by a vote of four to two, complied in all respects with the City Charter. Lewis C. Murphy Mayor of the City of Tucson, was absent from that meeting of the Council. On

May 1, 1975 Appellant was officially notified by letter, from the Clerk of the city, of his appointment. Appellant was ready, willing, and able to assume the position of City Magistrate and was eminently qualified having served as a Superior Court Judge and having a total of twelve and one-half years of judicial experience.

Seven days later, more specifically, May 5, 1975, the City Council, acting under the direction of Mayor Murphy, who had announced his displeasure with the Appellant's appointment, attempted to repeal and/or rescind Resolution No. 9496 by passage of Resolution No. 9502 with no emergency clause contained therein. The mayor and three council members voted in favor of the resolution; three councilmen voted against it. At this same meeting, the Council appointed Jean Williams to fill the vacancy created by Judge Brashear's resignation and Appellant's ostensible

removal. This was effected by Resolution No. 9503 (set forth in Appendix F), which had an emergency clause appended. On the 7th day of May, 1975, the City clerk notified Appellant by letter that his appointment as City Magistrate had been rescinded.

On the 19th day of May, 1975, the Mayor and Council re-passed and re-adopted Resolution No. 9502 by a six to one vote and appended an emergency clause.

On or about the 10th day of June, 1975, Appellant petitioned, in the Superior Court of the State of Arizona, in and for Pima County, for a Special Action and an Order To Show Cause why he should not be sworn to the office of City Magistrate. On October 6, 1975, the Superior Court granted Appellant's petition and ordered he be sworn to the office of City Magistrate within ten days.

On November 29, 1975 the Supreme Court of Arizona reversed the Superior Court's decision by a four to one decision with Vice Chief Justice Struckmeyer dissenting. A petition for rehearing was denied on January 4, 1977.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his Petition for Special Action, Appellant alleged that:

"Said Resolution passed without giving notice to the petitioner or providing him with an opportunity to be heard, and that Petitioner was removed from office without cause all in contravention of Petitioner's right to due process and equal protection under the laws of the United States as embodied in 42 U. S. C. §§1981 and 1983 and the laws of the State of Arizona."

The petition further alleged:

"That the Respondents by passing Resolution Number 9502 have proceeded and are threatening to proceed without and in excess of jurisdiction and/or legal authority and that the said passage was arbitrary and capricious, contrary to law and a denial of procedural and substantive due process and equal protection of the law in that the city's legislative body cannot change by ordinance or resolution the organic law of a city, state... [or] the United States and that the city ordinances or resolutions must fall if they conflict with the city charter provisions."

The Petition was accompanied by a Memorandum of Points and Authorities which

dealt extensively with the due process and equal protection issues involved in the validity of Resolution Number 9502 and the means by which it was effectuated.

The Superior Court granted Appellant's Petition. In its findings of law, it stated:

> "That the Respondent's attempt to repeal and/or rescind Resolution Number 9496, in addition to being an illegal and meaningless act and in contravention of the City Charter of the City of Tucson, was a violation of Petitioner's JOE JACOBSON'S, right to due process of law, since it attempted to deprive Petitioner, JOE JACOBSON, of his right to hold the office of City Magistrate, without giving him notice of such act, the reasons therefore, or an opportunity to be heard." (R217-218, see also Appendix G.)

The Superior Court found further:

> "That having once been duly and legally passed, Resolution Number 9496 was beyond the jurisdiction and authority of the Mayor and City Council of the City of Tucson and their reconsideration of the same. (R216-217; see also Appendix G.)

As to the Equal Protection Question, the Superior Court found in its findings of law:

> "That Petitioner, JOE JACOBSON'S appointment as aforesaid became final and binding and when passed, Resolution Number 9496 removed said appointment from reconsideration by the Mayor and City Council of the City of Tucson."

The alleged unconstitutionality of Rule I, Mayor and Council Rules and Regulations (1968) and Tucson City Charter Chapter XI, Sec. 8, were sufficiently presented to and decided by the Superior Court to be ripe for review on appeal.

Appellant raised the constitutional issues in his brief at pages 52 to 63 in the section entitled

> "V. THE ATTEMPT OF THE MAYOR AND COUNCIL OF THE CITY OF TUCSON TO REMOVE JACOBSON FROM THE OFFICE OF CITY MAGISTRATE WITHOUT NOTICE, OPPORTUNITY TO BE HEARD, OR SPECIFIC LEGAL CAUSE VIOLATED JACOBSON'S RIGHT TO DUE PROCESS OF LAW."

The Appellant further stated:

> II. THE APPOINTMENT OF JACOBSON TO THE OFFICE OF CITY MAGISTRATE EFFECTED BY RESOLUTION NO. 9496 TOOK EFFECT IMMEDIATELY UPON THE

> PASSAGE OF RESOLUTION NO. 9496 ON APRIL 28, 1975, NOTWITHSTANDING THE FAILURE OF THE COUNCIL TO INCLUDE AN EMERGENCY CLAUSE IN THE RESOLUTION. (Appellee's Brief p. 24 to p. 30).

and further,

> "B. THE USE OF THE EMERGENCY CLAUSE TO ADOPT RESOLUTION NO. 9502 AND RESOLUTION 9503 WAS INEFFECTIVE AND JACOBSON'S APPOINTMENT WAS THUS VALID EVEN IF IT DID NOT TAKE EFFECT IMMEDIATELY."
>
> (Appellee's Brief P. 47 to P. 52).

On appeal, the Supreme Court of Arizona upheld the validity of Resolution Number 9502 and the Charter provisions involved therewith and impliedly held them constitutional. (See Supreme Court Opinion, Appendix A.) The court found that Appellant had no vested right in the office and that the removal procedure by repeal of

the resolution was proper. As to the Due Process question, the Supreme Court of Arizona, Justice Holohan writing the opinion, stated:

> "Since we have held that Mr. Jacobson's resolution of appointment was not effective for thirty days, the Tucson Mayor and Council had full authority to reconsider the appointment as they would any type of resolution."

The court impliedly found no notice or opportunity to be heard was necessary prior to removal from office through repeal of the appointing resolution. As to the Equal Protection question, the Supreme Court of Arizona stated:

> "In City of Phoenix v. Landrum and Mills Realty Co., 71 Ariz. 382, 227 P.2d 1011 (1951), we ruled that the exercise of discretion by a city's legislature body in a

> determination of the existence of emergency is outside our scope of review." (558 P.2d at 690, Appendix A.)

The court refused to examine the facts which show manueverings and absence of changes in circumstances in the week time span between Appellant's appointment by resolution without an emergency clause and Jean Williams' appointment by resolution with an emergency clause.

Chief Justice Cameron and Justices Hayes and Gordon concurred, but did not write opinions.

Vice Chief Justice Struckmeyer dissented:

> "...from Marbury v. Madison [5 U.S. (1 Cranch) 137, 22 Ed. 60 (1803)] extending through a long line of cases, the rule has been

fixed that if a complete vote has been taken which results in the giving of the necessary majority or plurality to one of the candidates, a public body cannot rescind its vote or reconsider its action and select another person except in the manner lawfully permitted for removal." (558 P.2d 696, Appendix A.)

The dissenting opinion continued:

"An appointment is complete when the resolution providing for the appointment is finally passed 3 McQuillin, Municipal Corporations 392. That Jacobson could not enter into the performance of the duties of the office until May 28th because the operative date was postponed for the want of an emergency clause is of no moment. The appointment was final on April

28th and there was no power in the City Council to rescind the appointment. See Mansfield v. O'Brien 271 Mass 515, 171 N.E. 487 (1930); Morris v. Cashmore, 253 App. Div. 657, 3 NYS2d 624 (1938); State v. Miller, 620 Nis. St. 436, 57 N.E. 227, 78 Am.St. Rep. 732 (1900); State v. Tyrrell, 158 Wisc. 425, 149 N.W. 280 (1914). (558 P.2d 696; Appendix A.)

The opinion of the dissent recognizes that Appellant had a vested right which could be taken away only in accordance with the law and due process, and that Rule I of the Mayor and Council, Rules and Regulations (1968) allowing rescission of an appointing resolution without notice, hearing or cause, violates the Fourteenth Amendment of the Constitution of the United States.

A timely petition for rehearing was denied by the Supreme Court of the Arizona on January 4, 1977. Vice Chief Justice Struckmeyer voted in favor of granting the petition.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The opinion of the Supreme Court of Arizona upholding the validity of Resolution Number 9502 allowing Appellant's removal without notice and an opportunity to be heard violates the tenet that vested rights entitle their bearer to Due Process of the Law.

As construed by Arizona's highest court, Rule I of the Mayor and Council Rules and Regulations (1968) adopted pursuant to the City Charter of the City of Tucson, Chapter IX, Sec. 4 (1929), allows the City Council to

treat a resolution of appointment as a general resolution and rescind or repeal it prior to the time the appointee takes office. This encroachment upon the right to due process guaranteed by the federal constitution--on the basis of the "effective date" of the resolution and for political purposes-- raises serious questions under both the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Under the Supreme Court of Arizona's construction of the "emergency clause", it can be effectively used to discriminate without any rational basis in violation of the Equal Protection Clauses of the Fourteenth Amendment.

The issues raised in this jurisdictional statement are ripe for review in that the Appellant has been injured

and this Court has not yet ruled on the due process issues involved in the removal, without cause and as a result of political manuevering, of an appointed officer of a city through Resolution repealing or rescinding the appointment. The implications of Marbury v. Madison S.U.S. (1 Cranch) 137 (1830) and Arnett v. Kennedy, 416 U.S. 134 (1974) mandate this Court take jurisdiction of this appeal.

The issues on appeal are not moot. Appellant has pending in the Superior Court of Arizona, In and For Pima County, Case Number 160834, in which he is requesting damages for violations of his due process rights and for tortious interference with economic expectancy. The recovery in that case is conditioned, in part, in prevailing on appeal. Further, the issues are not moot

for they are capable of repetition yet evading review.

I.

RESOLUTION NUMBER 9502 AND RULE I, MAYOR AND COUNCIL RULES AND REGULATIONS (1968), ENACTED PURSUANT TO TUCSON CITY CHARTER, CHAPTER IX, SEC. 4, DENY APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS IN THE DEPRIVATION OF PROPERTY OR LIBERTY IN THE FORM OF PUBLIC OFFICE BY ALLOWING RECONSIDERATION AND RESCISSION OF APPOINTMENT TO OFFICE WITHOUT NOTICE AND OPPORTUNITY TO BE HEARD.

This Court has long held that vested rights can be divested only in accordance

with due process of law, including notice and an opportunity to be heard. Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951); Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

This court has also recognized that there exists a point in time at which the power of an executive over an officer, not removeable at will, must cease. This point in time comes when the power of appointment has been exercised; that is, when the last act required of the executive has been performed. Marbury v. Madison, 1 Cranch (5U.S.) 49 (1803); United States v. Charles LeBaron, 19 How. (60U.S.) 73 (1856).

The rule derived from these cases is generally stated, as applied to municipal corporations:

"When a completed vote has been taken which results in the giving up of the necessary majority or plurality to one of the candidates, the council cannot rescind its vote or reconsider its action and elect another person." 2 Dillion, Municipal Corporations (5th Ed) 3529. See also, 3 McQuillin, Municipal Corporations (3rd Ed.) 312.86, page 393.

Appellant was appointed to the Office of City Magistrate pursuant to Resolution Number 9496 which provides in pertinent part:

> "That Joe Jacobson be, and he hereby is, appointed as City Magistrate of the City of Tucson for the term commencing April 29, 1975 to and including April 28, 1977..."

This appointment was properly made under Tucson City Charter, Chapter V, Sec. 4.1.:

> "The... City Magistrate... shall be appointed by the Mayor and Council and shall hold office for a period of two years from the date of each appointment, unless sooner removed by the vote of two-thirds of the council voting affirmatively therefor."

Appellant was validly appointed and entitled to office under the terms of both the charter and Marbury v. Madison, supra. Appellant was legitimatly entitled his office and due process requires that a person be given notice and a hearing before such entitlement is revoked. Peacock v. Board of Regents of the Universities and State Colleges of Arizona, 510 F.2d 1324 (9th Cir. 1975). In Arnett v. Kennedy, 416 U.S. 134 (1974)

this Court recognized the necessity of due process when legitimate entitlement is involved:

> "[W]here there is a legitimate entitlement to a job, as when a person is given employment subject to his meeting certain specific conditions, due process requires, in order to insure against arbitrariness by the State and the administration of its law, that a person be given notice and a hearing before he is finally discharged." 416 U.S. at 135.

A valid expectancy arose in this case from the accepted practice in this state that an appointed officer has never been removed from office without cause. Cf., Perry v. Sinderman, supra.

The Appellees argued that the appointment was not effective under the terms of Tucson City Charter, Chapter

XI, Sec. 8, which provides:

> "No ordinance, resolution or franchise shall take effect and become operative until thirty days after its passage, except measures necessary for the immediate preservation of the peace . . . but . . .[only then, if an emergency clause is appended]."

The apparent conflict between the two charter provisions, Chapter V, Sec. 4.1 and Chapter IX, Sec. 8, must be reconciled so that the meaning and intent of the special provision dealing specifically with appointments controls over the general provisions. Kearney v. Mid-Century Co., 22 Ariz. App. 190, 526 P.2d 169 (1974); such immediate vesting of the interest in public office upon appointment is required by Marbury v. Madison, supra.

Inasmuch as Appellant was validly appointed City Magistrate and was duly notified of such appointment, a vested or legitimate expectancy interest necessarily arose. Board of Regents v. Roth, supra; Bishop v. Wood, 96 S.Ct.2074 (1976) Further, under the terms of Tucson City Charter, Chapter V, Sec. 4, provides that the terms of office is two years "unless sooner removed by the vote of two-thirds of the council voting affirmatively therefor." The legal effect of such a provision is to make the person removeable for cause only. See P.A.A.C. v. Rizzo, 502 F.2d 306 (1974). See generally, annotation, Appointment to Office - Reconsideration, 89 ALR 132. The fact that a magistrate is removeable only for cause, gives the Appellant a greater interest and more protection than had a magistrate been terminable at will. Bishop v. Wood, supra;

Norton v. Blaylock, 285 F.Supp. 659 (1968); Keekow v. Village of Chenequa, 342 F. Supp. 494 (1972).

The Rule I, Mayor and Council Rules and Regulations (1968), giving the council power to reconsider and rescind an appointment to a public office without cause, violates the separation of powers. Meyers v. United States, 272 U.S. 52 (1926); Humphrey's Executor v. United States, 295 U.S. 602 (1935). To allow such reconsideration and rescission without notice and opportunity to be heard for the appointee would increase the political manipulation, partisan strife and corrupt bargaining of the executive branch. See e.g., State ex rel Pierce v. Hardin, 163 Tenn. 471, 4 S.W.2d 924 (1931).

II.

TUCSON CITY CHARTER CHAPTER XI, SEC. 8, WHICH ALLOWS IMMEDIATE APPOINTMENT AND EFFECTIVENESS OF APPOINTMENT IN CASES WHERE AN EMERGENCY IS FOUND TO EXIST BY THE COUNCIL AND A THIRTY DAY DELAY WHERE NO EMERGENCY IS FOUND TO EXIST DEPRIVES APPELLANT OF EQUAL PROTECTION OF THE LAWS AS APPLIED IN THIS CASE

The Equal Protection Clause of the Fourteenth Amendment commands that distinctions drawn by a state or municipal body in conferring benefits or imposing burdens must not be arbitrary, invidious or capricious. Gulf Colorado and Santa Fe Ry. v. Ellis, 165 U.S. 150 (1897); Skinner v. Oklahoma, 316 U.S. 536 (1942); Baxstrom v. Herold, 383 U.S.

107 (1966). There can be no difference in the treatment among citizens unless there is a rational distinction between the classes affected. By this standard the application of Chapter XI, Sec. 8, of the Tucson City Charter is invidious, irrational and, therefore, unconstitutional. On April 28, 1975, the Appellant was appointed to office with no emergency clause being appended. On May 5, Appellant was removed from office by a reconsideration of the resolution appointing him. On that same day, by Resolution Number 9503, Ms. Jean Williams was appointed a City Magistrate to replace Appellant. Her appointment had an emergency clause appended. The situation and circumstances had not changed in the week time span so as to create an emergency. The facts of the case show that the need for the emergency clause was created by the

political manuevering of the City Council and was a sham designed to deprive Appellant of his constitutional right to due process. The City Council has used the emergency clause to discriminate against the Appellant with no rational basis; therefore, the Tucson City Charter, Chapter XI, Sec. 8, must be declared unconstitutional as applied to these facts.

C O N C L U S I O N

WHEREFORE, Appellant requests that this Honorable Court grant jurisdiction to determine the constitutional questions herein presented.

Respectfully submitted,

JOHNSON, HAYES & DOWDALL, LTD.

BY Richard J. Dowdall
RICHARD J. DOWDALL
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, RICHARD J. DOWDALL, one of the attorneys for JOE JACOBSON, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28th day of March, 1977, I served copies of the foregoing Jurisdictional Statement For Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

On the respondents, CITY OF TUCSON, et al., by hand delivering three (3) copies to their attorneys of record:

FREDERICK S. DEAN
Acting City Attorney

THOMAS J. WILSON
Assistant City Attorney
180 North Meyer
P. O. Box 27210 (85726)
Tucson, Arizona 85701

JOHNSON, HAYES & DOWDALL, LTD.

BY Richard J. Dowdall
RICHARD J. DOWDALL

APPENDIX A

OPINION OF SUPREME COURT OF ARIZONA

A P P E N D I X

APPENDIX A

SUPREME COURT OF ARIZONA
In Banc

NO. 12582

CITY OF TUCSON, a body politic, Lewis C. Murphy, the Mayor of the City of Tucson, Donald L. DeMent, City Clerk of the City of Tucson, Ruben Romero, Richard J. Kennedy, Robert C. Cauthorn, Emmett McLoughlin, Rudy A. Castro and Barbara L. Weymann, Members of the City Council of the City of Tucson,

Appellants,

v.

JOE JACOBSON,

Appellee.

Filed November 29, 1976, Clifford H. Ward, Clerk Supreme Court.

Appeal from the Superior Court of Pima County, Cause No. 155294, The Honorable Gordon Farley, Judge. REVERSED.

HOLOHAN, Justice

The City of Tucson, its council, and mayor have appealed the judgment of the

superior court setting aside certain resolutions of the council and ordering that appellee Joe Jacobson be allowed to assume the office of city magistrate of Tucson. We assume jurisdiction pursuant to 17A A.R.S. Rule 47(e) (5), Rules of the Supreme Court.

The facts are not in dispute. On April 25, 1975 City Magistrate William Brashears advised the city council that he was resigning as magistrate effective May 2, 1975. Mr. Brashears had originally been appointed magistrate on April 9, 1973 for the usual two-year term. The city council had taken no action to extend or renew the term of Mr. Brashears prior to receiving his letter of resignation.

After receiving the letter of resignation the city council, on April 28, 1975, appointed, by resolution, Joe Jacobson to the office of City Magistrate for a term of

two years commencing April 29, 1975. An attempt to append an emergency clause to the resolution failed. At a meeting of the council held on May 5, 1975, a second resolution was passed which repealed the resolution of April 28th and voided the appointment of Jacobson. At a subsequent regular session of the council held on May 19, 1975, it was moved that the May 5th resolution be reconsidered for the purpose of attaching to it an amergency clause. The motion passed unanimously and the reconsidered resolution of repeal was passed and adopted with the inclusion of an emergency clause.

Appellee filed a petition for special action in the superior court, secured the judgment above referred to, and this appeal followed.

The primary issue in this case is the determination of when Mr. Jacobson's

appointment to the office of city magistrate became effective. Appellants argue that the original resolution of appointment did not become effective for thirty days because there was no emergency clause added to the resolution. Appellee maintains the resolution of appointment became effective on the date of its passage.

Prior to our determination of the primary issue we must consider appellants' threshold argument that a vacancy did not exist in the office of city magistrate. In support of their position, appellants cite provisions from the Tucson City Charter[1] and the Tucson City Code[2] which provide for

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1. Chapter XII, Section 3 of the Tucson City Charter (1929), provides as follows: "There shall be at least <u>one</u> city magistrate appointed by the mayor and council who shall be judge of the city court. He shall hold office for a term of two years, or until his successor is appointed and qualified, unless sooner removed from office in the manner provided in this charter." (Emphasis supplied.)

(Continued on following page)

the establishment of one chief city magistrate and such assistants allowed by the mayor and council. It is therefore argued that as long as one position of chief city magistrate is filled there is no vacancy to be filled by the mayor and council. Appellees counter this argument with the contention that a vacancy in the city magistrate's office existed after the expiration of Mr. Brashears' two-year term on April 8, 1975. We do not agree with either of these arguments.

Under the Tucson City Charter the

Footnote continued

2. Chapter XIII, Section 8-2 of the Tucson City Code (1964) provides: "There shall be appointed a chief city magistrate and such other additional magistrates as determined by the mayor and council. The chief city magistrate shall be responsible for the administration of the city court. Each magistrate shall exercise all of the powers and duties of the city magistrate as provided by the Charter and Code of the city and the Constitution and laws of the State of Arizona in such case made and provided." (Emphasis supplied.)

the existence or nonexistence of an office vacancy is determined by Chapter VIII, Section 5 (1929), which provides:

> "A vacancy shall exist in any elective or appointive office, except under the recall provisions of this charter, when an officer fails to qualify within thirty days after commencement of his term, dies, resigns, removes from the city, absents himself continuously for thirty days from the duties of his office without the consent of the council, for two consecutive months, is incapacitated so that he is unable to attend to the duties of his office, is convicted of violating any of the provisions of this Charter, or of a felony, or is judicially declared a lunatic as defined by statute, or, in the office of councilman, when a member of the council is selected to fill

a vacancy in the office of mayor, as hereinbefore provided."

In the case before us Mr. Brashears continued to hold over in his office of city magistrate following his expired term of office. As previously set forth in Chapter 8, § 8-2 of the Tucson City Code (1964), the term of office for a city magistrate is "two years, or until his successor is appointed and qualified, unless sooner removed from office." (Emphasis supplied.) In its interpretation of very similar language in Article XXII, § 13 of the Arizona Constitution,3 this court has held that where an incumbent officer holds over following the expiration of his term the

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3. Article XXII, § 13 of the Arizona Constitution provides:

> "The term of office of every officer to be elected or appointed under this Constitution or the laws of Arizona shall extend until his successor shall be elected and shall qualify."

office he holds is not vacant. McCall v. Cull, 51 Ariz. 237, 75 P.2d 696 (1938); Sweeney v. State, 23 Ariz. 435, 204 P. 1025 (1922). As was stated in Sweeney v. State, supra:

> ". . .(T)he additional term, though in its nature contingent and defeasible, is, while it exists, as much a part of the term of the incumbent as is his original, fixed, or regular term. Such incumbent is entitled to hold over after the expiration of his regular term, until the happening of both the events mentioned; i.e., the election of his successor and the qualification of such successor. During the period of the tenure as so extended the office will not become vacant, uless for causes which would create a vacancy in the fixed and regular term, such as the death,

resignation, removal, disqualification, or the like, of the incumbent." 23 Ariz. at 441.

At the time of passage of the original resolution of appointment on April 28, 1975, the office occupied by Mr. Brashears was not vacant. Although technically a vacancy did not exist in the office of city magistrate on April 28, 1975, the mayor and council could replace Mr. Brashears by appointing a new magistrate who would take office when qualified. As we shall point out, the new appointee could not qualify for the office until the mayor and council's appointment became effective.

Fundamental to the controversy before us is the point in time when the appointment of Mr. Jacobson became irrevocable and not subject to reconsideration or repeal. As Chief Justice Marshall enunciated in Marbury v Madison, 1 Cranch 137, 2 L. Ed.

60 (1803), the general rule is that an appointment is complete only after the performance of the last act required of the appointing power. See 3 E. McQuillin, "The Law of Municipal Corporations" § 12.86 (3rd Ed. 1968).

Pursuant to the Tucson City Charter, Chapter IX, Sec. 4 (1929):

"The mayor and council shall establish rules for their proceedings, and shall act only by resolutions or ordinance."

(Emphasis supplied.)

In compliance with this directive and the appointive authority given to the mayor and council by the Tucson City Charter Chapter V, Sec. 4 (1929), Mr. Jacobson's appointment to the office of city magistrate was implemented in the form of a resolution. The Tucson City Charter does not authorize the mayor and council to make appointments to city offices by any other method. We

view this resolution of appointment as the only correct manner which the mayor and council could use to implement their action.

All actions taken by the Tucson mayor and council do not become effective until thirty days after their passage unless accompanied by an emergency clause. Tucson City Charter Chapter IX, Sec. 8 (1929) provides that such officer "shall hold office for a period of two years from the date of each appointment." We do not believe the two provisions are either conflicting or inconsistent. We interpret the commencement date of the city magistrate's term as set forth in Chapter V, Sec. 4.1, supra, to be the effective date of an appointment and not necessarily the date upon which the appointive authority acted to make the appointment. Where a resolution of appointment contains an emergency clause the effective date will coincide

with the date of passage if the resolution so designates. Otherwise, an appointment is treated as all other resolutions and does not become effective for at least thirty days following its passage. Mr. Jacobson's appointment did not contain an emergency clause and therefore was not to be effective until thirty days after the mayor and council acted.

Having ruled that Mr. Jacobson's appointment was not to become effective for thirty days, we must now determine what effect subsequent actions by the Tucson mayor and council had on that appointment. We note that the mayor and council had, prior to the appointment now in question, adopted rules and regulations governing their proceedings pursuant to the Tucson City Charter, Chapter IX, Sec. 4, supra. Rule I of the Mayor and Council, Rules and Regulations (1968), provides that when a

motion has been made and carried or lost, it shall be in order for any member who voted with the prevailing side to move for reconsideration thereof on the same or succeeding meeting day. On May 5, 1975, the succeeding meeting day following Mr. Jacobson's appointment, the mayor and council took two separate actions by which they sought to void their resolution of appointment. First, the mayor and council voted, by separate resolution, to repeal Mr. Jacobson's appointment. Second, the mayor and council, in full compliance with their own Rule I, moved to reconsider their previous resolution of appointment.

Since we have held that Mr. Jacobson's resolution of appointment was not effective for thirty days, the Tucson mayor and council had full authority to reconsider the appointment as they would any type of resolution. The appointment was recon-

sidered and denied by the mayor and council on May 5, 1975. As we have pointed out, the same resolution of appointment was also repealed on May 5, 1975. The repealing resolution was reconsidered on May 19, 1975, when an emergency clause was added giving effect to the repeal on that date. We recognize the cautious thoroughness exhibited by this dual action but we do not believe that it was necessary in this case. The reconsideration of the resolution of appointment on May 5, 1975, was sufficient to make that appointment immediately ineffective. The resolution of repeal and subsequent addition of an emergency clause were mere surplusage.

Appellee has argued that the emergency clause of May 19, 1975, is without effect because it is lacking in specificity and is not in compliance with the Charter requirement that reasons for the emergency be

stated separately. In City of Phoenix v. Landrum & Mills Realty Co., 71 Ariz. 382, 227 P.2d 1011 (1951), we ruled that the exercise of discretion by a city's legislative body in a determination of the existence of an emergency is outside our scope of review. We also note that since the repealer and emergency clause were surplusage we need not consider this argument. We therefore will not review the emergency clause determination made by the Tucson mayor and council.

Finally, appellee argues that the resolution of appointment of Mr. Jacobson has the force and effect of a contract and cannot be reconsidered.[4] Since we have

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4. Subsection 4 of Rule I, Mayor and Council Rules and Regulations (1968) provides:

> "No matter approving a contract may be reconsidered after execution of the contract, unless the party to the contract has not yet acted thereon to his detriment."

ruled that the resolution of appointment was not effective for thirty days, there was no contract executed at the time Mr. Jacobson's appointment was reconsidered. The mayor and council were not prohibited from making that reconsideration.

Based upon the foregoing analysis we conclude that the reconsideration action taken by the Tucson mayor and council on May 5, 1975, made Mr. Jacobson's appointment ineffective as of that date.

Reversed.

WILLIAM A. HOLOHAN,
Justice

CONCURRING:

JAMES DUKE CAMERON, Chief Justice

JACK D. H. HAYS, Justice

FRANK X. GORDON, JR., Justice

STRUCKMEYER, Vice Chief Justice, dissenting:

I am unable to agree with the majority in their resolution of this case. The facts

are uncomplicated; the legal consequences elementary.

Appellee, Joe Jacobson, was appointed as City Magistrate for the City of Tucson by Resolution No. 9496 of the City Council on April 28, 1975. The resolution provided:

> "BE IT RESOLVED * * * (that) Joe Jacobson be and he hereby is, appointed a City Magistrate of the City of Tucson, Arizona, for the term commencing April 29, 1975 to and including April 28, 1977 * * *."

That the resolution was a present appointment, a complete and final enactment as of the time of its passage, April 28, 1975, cannot be doubted. While the operative date of the resolution was postponed for 30 days because it was not enacted as an emergency measure, the legal effect so far as Jacobson was concerned is that the commence-

ment of his duties and responsibilities was postponed for 30 days until May 28, 1975.

One week later, on May 5, 1975, the City Council by a 4 to 3 vote purported to rescind Resolution 9496 by the adoption of its Resolution 9502. At the same meeting, following the passage of Resolution 9502, the Council by the same vote adopted Resolution 9503 appointing a person other than Jacobson as City Magistrate. Thereafter, on May 19, a motion was made to reconsider Resolution 9502. This motion passed and Resolution 9502 was then re-adopted by a vote of 6 to 1 with an emergency clause.

The principle controlling here was early stated by Chief Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803):

> "Some point of time must be taken when the power of the executive over an officer, not removeable at his

will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed." 5 U.S. at 157.

From Marbury v. Madison, extending through a long line of cases, the rule has been fixed that if a complete vote has been taken which results in the giving of the necessary majority and plurality to one of the candidates, a public body cannot rescind its vote or reconsider its action and select another person except in the manner lawfully permitted for removal.

In Ekonomon v. Town of Milford, 21 Conn.Sup. 123, 145 A.2d 381 (1958), for example, eleven members of the town council voted the nomination and election of certain persons to membership on its urban rede-

velopment agency. The council had proceeded to other business when four councilmen who had not been present during the voting arrived at the meeting and asked to be allowed to vote on the membership of the agency. All fifteen members of the council voted to suspend the rules to permit the four members to vote and to add their votes to the previously announced totals, with the result that one person of those originally elected to membership was replaced by another person. The Connecticut court held:

"This court is of the opinion that the election or appointment in this case was made when the result of the first ballot was acertained and declared. Nothing more was required of the council to complete it. Its will had been expressed in a parliamentary and legal manner, had been duly de-

clared, and had become a matter of record. Nothing further was required by law. Mr. Chase's right to the office vested at once, and he might without further ceremony accept and qualify. Hall v. Inhabitants of Holden, 116 Mass. 172, 176; Montefiore Cemetery Co. v. Board of Com'rs of City of Newark, 130 A.730, 3 N.Y.Misc. 1100 1101; Marbury v Madison, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60.

* * * * * * * *

* * * An appointment is complete when the last act required of the appointing power has been performed. This appointment is evidenced by an open, unequivocal act which, being the last act required from the person or body making it, necessarily excludes the idea of its being, so far as respects the appointment, an

inchoate and incomplete transaction. Some point of time must be taken when the power of the appointive power over an officer, not removable at will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act required from the person or body possessing the power has been performed. Marbury v. Madison, supra."

145 A.2d at 383-384.

An appointment is complete when the resolution providing for the appointment is finally passed. 3 McQuillan, Municipal Corporations 392. That Jacobson could not enter into the performance of the duties of the office until May 28th because the operative date was postponed for the want of an emergency clause is of no moment. The appointment was final on April 28th and

there was no power in the City Council to rescind the appointment. See Mansfield v. O'Brien, 271 Mass. 515, 171 N.E. 487 (1930); Morris v Cashmore, 253 App.Div. 657, 3 N.Y.S.2d 624 (1938); State v. Miller, 62 Ohio St. 436, 57 N.E. 227, 78 Am.St.Rep. 732 (1900); State v Tyrrell, 158 Wisc. 425, 149 N.W. 280 (1914). And see also "Reconsideration of appointment or confirmation of appointment to office", 89 A.L.R. 132 and authorities cited from 24 states that the appointment is final when the last act of the appointment body has been performed.

Appellants argue that a Tucson city magistrate may be removed from office without cause, and this is true. By Chapter 5, § 4.1 of the Tucson City Charter, the city post auditor, city attorney, city clerk and city magistrate hold their offices for two years unless removed by a vote of two-thirds of the Council "voting affirmatively

therefor." From this, appellants further argue that Resolution 9502 as passed and adopted on May 19, 1975 with the emergency clause making it effective immediately was an exercise of the authority provided in the City Charter to remove a magistrate.

Such argument is obviously specious. Resolution 9502 was to rescind Resolution 9496. There is not the slightest suggestion in Resolution 9502 that it purported to remove an existing city magistrate. It does not follow that the members of the City Council who voted to rescind the resolution of appointment, No. 9496, would for the same reason vote to remove or dismiss Jacobson as a city magistrate. In any event, they did not.

For the foregoing reasons, the judgment of the Superior Court of Pima County should be affirmed.

FRED C. STRUCKMEYER, JR.
Vice Chief Justice

APPENDIX B

RESOLUTION NUMBER 9496

APPENDIX B

Adopted 4/28/75
without emergency
clause
To become effective
5/28/75

ADOPTED BY
THE MAYOR
AND COUNCIL

April 28, 1975

RESOLUTION NO. 9496

RELATING TO CITY MAGISTRATE; APPOINTING JOE JACOBSON A CITY MAGISTRATE; FIXING HIS ANNUAL COMPENSATION.

BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA, AS FOLLOWS:

SECTION 1. That Joe Jacobson be and he hereby is, appointed a City Magistrate of the City of Tucson, Arizona, for the term commencing April 29, 1975 to and including April 28, 1977, at an annual salary of Twenty-one Thousand Five Hundred and No/100 ($21,500.00) Dollars, together with cost of living increases and such additonal benefits, such as longevity pay or insurance, as are generally granted regular City employees from time to time during

said term.

~~SECTION 2. WHEREAS, it is necessary for the preservation of the peace, health and safety of the City of Tucson, Arizona, that this resolution become immediately effective, an emergency is hereby declared to exist, and this resolution shall be effective immediately upon its passage and adoption.~~

PASSED, ADOPTED AND APPROVED by the Mayor and Council of the City of Tucson, Arizona, April 28, 1975.

/s/Rubin Romero
MAYOR
PRO-TEMPORE

ATTEST:

/s/ Donald DeMent
CITY CLERK

APPENDIX C

LETTER OF APPOINTMENT

APPENDIX C

CERTIFIED

May 1, 1975

Mr. Joe Jacobson
460 N. Silverbell
Tucson, Arizona

Dear Mr. Jacobson:

The Mayor and Council appointed you on April 28, 1975 as a City Magistrate of the City of Tucson, for a term commencing May 28, 1975. Attached is a copy of that Resolution for your information. Please contact this office at your convenience so that arrangements can be made to administer your Oath of Office.

Congratulations on your appointment and should you require additional information or assistance, please do not hesitate to contact this office.

Sincerely,

Donald L. DeMent
City Clerk

JMB

CITY CLERK'S NOTE: CERTIFIED MAIL #581177

APPENDIX D

RESOLUTION NUMBER 9502

APPENDIX D

Adopted 5/5/75
without emergency
clause
To become effective
6/4/75

ADOPTED BY
THE MAYOR
AND COUNCIL

May 5, 1975

RESOLUTION NO. 9502

RELATING TO APPOINTMENT OF CITY COURT MAGISTRATES; REPEALING RESOLUTION NO. 9406 OF THE MAYOR AND TUCSON CITY COUNCIL.

WHEREAS, on April 28, 1975, the Mayor and Council of the City of Tucson passed Resolution No. 9496 appointing a City Court magistrate,

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA, AS FOLLOWS:

SECTION 1. That Resolution No. 9496 be and is hereby repealed.

~~SECTION 2. WHEREAS, it is neces~~sary for the preservation of the peace, health and safety of the City of Tucson that this resolution become immedidately effective, an emergency is hereby declared to exist, and this resolution shall be effective immediately upon its passage and ~~adoption.~~

PASSED, ADOPTED AND APPROVED by the Mayor and Council of the City of Tucson, Arizona, May 5, 1975

/s/ Lewis C. Murphy
MAYOR

ATTEST:

/s/ Donald DeMent
CITY CLERK

(Seal)

APPENDIX E

LETTER OF RESCISSION

APPENDIX E

May 7, 1975

Mr. Joe Jacobson
460 N. Silverbell
Tucson, Arizona 85705

Dear Mr. Jacobson:

By action of the Mayor and Council on May 5, 1975, Resolution No. 9502 rescinded your appointment as a City Magistrate as previously established by Resolution No. 9406. A copy of the resolution accomplishing this action is attached for your information.

Should you have questions regarding this matter, please contact this office.

Sincerely,

Donald L. De Ment
City Clerk

ks
Enc. (1)

CITY CLERK'S NOTE: CERTIFIED MAIL #581152

APPENDIX F

RESOLUTION NUMBER 9503

Mayor Murphy: Mr. Clerk, without objection you are requested to read Resolution No. 9503 in full.

City Clerk Donald De Ment: RESOLUTION NO. 9503. RELATING TO CITY MAGISTRATE; APPOINTING JEAN WILLIAMS A CITY MAGISTRATE; FIXING HER ANNUAL COMPENSATION. BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA, AS FOLLOWS:
SECTION 1. That Jean Williams be and she hereby is, appointed commencing May 6, 1975, to and including May 5, 1977.
SECTION 2. Her salary shall be Twenty-one Thousand Five Hundred and No/100 ($21,500.00) per annum, together with cost of living increases and such additional benefits, such as longevity pay or insurance as are generally granted regular City employees from time to time during said term.

Mr. Mayor, Section 3 is the normal emergency clause.

APPENDIX G

FINDING OF FACTS, CONCLUSIONS OF LAW, AND JUDGMENT OF THE SUPERIOR COURT

APPENDIX G

IN THE
SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

NO. 155294

JOE JACOBSON,

Petitioner,

vs

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, the Mayor of the City of Tucson, DONALD L. DeMENT, City Clerk of the City of Tucson, RUBEN ROMERO, RICHARD J. KENNEDY, ROBERT C. CAUTHORN, EMMENT McLOUGHLIN, RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Council of the City of Tucson,

Respondents.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter having come on regularly to be heard by the Court, sitting without a jury, the parties appearing by their respective counsels, and having submitted Memoranda of Points and Authorities, as well as Proposed Findings of Fact and Conclusions

of law, and the Court having reviewed same and the evidence, the Court does make its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. That prior to the 8th day of April, 1975, the Respondent, CITY OF TUCSON, had caused to be appointed and/or appointed five City Magistrates, each occupying a term of office as City Magistrate.

2. That on or about the 9th day of April, 1973, WILLIAM BRASHEAR was appointed one of the City of Tucson's City Magistrates, pursuant to the City Charter of the City of Tucson.

3. The term of the office of City Magistrate, WILLIAM BRASHEAR, terminated on the 8th day of April, 1975.

4. That City Magistrate, WILLIAM BRASHEAR, continued his tenure of office until his successor was duly appointed by

the City Council and Mayor, pursuant to the City Charter of the City of Tucson, which appointment took place on April 28th, 1975.

5. On the 28th day of April, 1975, the CITY OF TUCSON, acting by and through the City Council of the City of Tucson, the Respondent, LEWIS C. MURPHY, Mayor of the City of Tucson, being absent, appointed the Petitioner, JOE JACOBSON, to fill the vacancy of the office of City Magistrate of the City of Tucson, which office had been occupied by WILLIAM BRASHEAR prior to the appointment of Petitioner, JOE JACOBSON.

6. On April 28th, 1975, the CITY OF TUCSON, acting by and through the City Council of the City of Tucson, and pursuant to the City Charter of the said City, appointed Petitioner, JOE JACOBSON, to a term of office as heretofore stated for a term commencing April 29th, 1975 to and including April 28th, 1977 by its Resolution

#9496, which Resolution did in all respects comply with and was pursuant to the City Charter of the City of Tucson.

7. That on or about May 1st, 1975, the Respondent, DONALD L. DeMENT, Clerk of the City of Tucson, by letter officially notified Petitioner, JOE JACOBSON, of his appointment as City Magistrate of the City of Tucson.

8. That Petitioner, JOE JACOBSON, is duly qualified to act as a City Magistrate of the City of Tucson.

9. That on or about the 5th day of May, 1975, and again on or about the 19th day of May, 1975, the CITY OF TUCSON, acting by and through the Respondent, LEWIS C. MURPHY, Mayor of the City of Tucson, and Respondents City Councilmen attempted to repeal and/or rescind the above referred to Resolution #9496, by the passage of Resolution #9502.

10. That the Petitioner, JOE JACOBSON, was never given notice of the Respondents' attempt to pass or act on Resolution #9502.

11. On May 5th, 1975, and immediately following the said CITY OF TUCSON'S attempt to rescind and/or repeal Resolution #9496, as hereinabove set forth, the said Respondent, CITY OF TUCSON, acting by and through the Respondent, LEWIS C. MURPHY, Mayor of the City of Tucson, and certain City Councilmen of the City of Tucson, passed Resolution #9503, which Resolution appointed JEAN WILLIAMS as City Magistrate of the City of Tucson to fill the vacancy and term of office of WILLIAM BRASHEAR, which term had expired on or about April 9th, 1975.

12. That after the 5th day of May, 1975, the Respondents would not accept any oath of office that Petitioner, JOE JACOBSON, may have taken and any attempt by Petitioner, JOE JACOBSON, to take the oath

of office of City Magistrate of the City of Tucson, as provided by law, would have been a futile act by him even though he stood ready, willing and able to take the requisite oath.

13. On April 28, 1975, at a regular session of the Mayor and Council of the City of Tucson, Resolution No. 9496 was passed by a vote of 4 to 2, without an emergency clause.

14. That on May 5, 1975, at a regular session of the Mayor and Council of the City of Tucson, Councilmember McLOUGHLIN, having voted on the prevailing side of the motion adopting Resolution No. 9496, moved to reconsider Resolution No. 9496.

15. That on May 5, 1975, at the regular session of the Mayor and Council of the City of Tucson, Resolution No. 9496 was reconsidered pursuant to the Rules and Regulations adopted by the Mayor and Council,

and defeated by a vote of 4 to 3.

16. That on May 5, 1975, at a regular session of the Mayor and Council of the City of Tucson, Resolution No. 9502 was passed by a vote of 4 to 3.

17. That on May 19, 1975, at a regular session of the Mayor and Council of the City of Tucson, Resolution No. 9502, upon motion of Councilmember McLOUGHLIN, was adopted by a vote of 6 to 1, with the emergency clause.

18. That the Plaintiff, JOE JACOBSON, did not appear to take the oath of office until May 29, 1975.

CONCLUSIONS OF LAW

1. That this Court has jurisdiction over the parties and the subject matter.

2. That Respondents' attempts to rescind and/or repeal the appointment of JOE JACOBSON as City Magistrate are null

and void and of no legal effect by reason of being in contravention of the City Charter of the City of Tucson and contrary to law.

3. That WILLIAM BRASHEAR'S term of office terminated by reason of the provisions of the City Charter of the City of Tucson, on April 8th, 1975.

4. That WILLIAM BRASHEAR'S tenure in office as City Magistrate of the City of Tucson continued, by reason of the City Charter of the City of Tucson, until his successor was duly appointed.

5. That Petitioner, JOE JACOBSON, was duly and legally appointed to the office of City Magistrate on April 28th, 1975, by reason of Respondents' Resolution #9496 and the said appointment terminated the tenure in office of City Magistrate, WILLIAM BRASHEAR.

6. That the City Charter of the City

of Tucson provides that the City Magistrate shall be appointed for a term of office of two years from the date of appointment.

7. That Resolution #9496 was legally passed by the acting Mayor and the City Council of Tucson, Arizona, on April 28th, 1975, and provided for the appointment of JOE JACOBSON as City Magistrate for a specific term and at a specific compensation and has the force and effect of a contract and the appointing body is precluded from reconsideration of same after its execution.

8. That the rescinding of the legal resolution of appointment as a City Magistrate by a Mayor and City Council does not amount to the act of removal of an appointed City Magistrate, which appointment is for a fixed term.

9. That by reason of the acts and conduct of Respondents, the Petitioner, JOE

JACOBSON, had no legal duty to submit his oath of office to Respondents or either of them.

10. That Petitioner, JOE JACOBSON'S appointment, as aforesaid, became final and binding and when passed, Resolution #9496 removed said appointment from reconsideration by the Mayor and City Council of the City of Tucson.

11. That having once been duly and legally passed, Resolution #9496 was beyond the jurisdiction and authority of the Mayor and City Council of the City of Tucson and their reconsideration of same.

12. That the Respondents' attempt to repeal and/or rescind Resolution #9496, in addition to being an illegal and meaningless act and in contravention of the City Charter of the City of Tucson, was a violation of Petitioner's, JOE JACOBSON'S, right to due process of law, since it attempted to

deprive Petitioner, JOE JACOBSON, of his right to hold the office of City Magistrate, without giving him notice of such act, the reasons therefore, or an opportunity to be heard.

DATED this 7th day of October, 1975, nunc pro tunc.

/s/ Gordon Farley
GORDON FARLEY
Judge of the Superior Court

APPENDIX H

DENIAL OF MOTION FOR REHEARING

APPENDIX H

SUPREME COURT
STATE OF ARIZONA
PHOENIX
85007

January 5, 1977

CITY OF TUCSON, a body politic, Lewis C. Murphy, the Mayor of the City of Tucson, Donald L. DeMent, City Clerk of the City of Tucson, Ruben Romero, Richard J. Kennedy, Robert C. Cauthorn, Emmett McLoughlin, Rudy A. Castro and Barbara L. Weymann, Members of the City Council of the City of Tucson,

Appellants,

v.

JOE JACOBSON,

Appellee.

Supreme Court
No. 12582

Pima County
No. 155294

The following action was taken by the Supreme Court of the State of Arizona on January 4, 1977 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = DENIED."

Vice Chief Justice Fred C. Struckmeyer,

voted to grant.

Mandate enclosed herewith.

CLIFFORD H. WARD, Clerk

by /s/ Mary Ann Hopkins
Deputy Clerk

TO: James D. Webb, Tucson City Attorney, P. O. Box 27210, Tucson, Arizona 85703 Attn: Thomas J. Wilson, Esq.
Richard J. Dowdall, Esq., Johnson, Hayes & Dowdall, 250 North Church Tucson, Arizona 85701
Hon. Gordon Farley, Judge, Santa Cruz County Superior Court, Santa Cruz County Courthouse, Nogales, Arizona 85621
Hon. Harry Gin, Presiding Judge, Pima County Superior Court, Pima County Courthouse, Tucson, Arizona 85701

dkb

APPENDIX I

NOTICE OF APPEAL

APPENDIX I

SUPREME COURT OF ARIZONA
In Banc

NO. 12582

CITY OF TUCSON, a body politic, Lewis C. Murphy, the Mayor of the City of Tucson, Donald L. DeMent, City Clerk of the City of Tucson, Ruben Romero, Richard J. Kennedy, Robert C. Cauthorn, Emmett McLoughlin, Rudy A. Castro and Barbara L. Weymann, Members of the City Council of the City of Tucson,

Appellants,

v.

JOE JACOBSON,

Appellee.

NOTICE OF APPEAL TO
THE SUPREME COURT OF
THE UNITED STATES

Notice is hereby given that JOE JACOBSON, the appellee above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Arizona of January 4, 1977, denying rehearing on its judgment of November 29, 1976, holding that the removal was authorized and constitutional, thereby

reversing the decision of the Superior Court of Pima County holding that the removal of JOE JACOBSON from office under the applicable city ordiance was illegal and that he was entitled to be sworn for office.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

JOHNSON, HAYES & DOWDALL, LTD.

BY: /s/ Richard J. Dowdall
Richard J. Dowdall
Attorney for Joe Jacobson
Appellee

STATE OF ARIZONA)
) ss
COUNTY OF PIMA)

Certificate of Service

In accordance with Supreme Court Rule 33(1), service has been made on all parties by mailing a copy of the foregoing notice to:

James D. Webb
Tucson City Attorney

P. O. Box 27210
Tucson, Arizona 85703
ATTN: Thomas J. Wilson, Esq.

JOHNSON, HAYES & DOWDALL, LTD.

BY: /s/ Richard J. Dowdall
Richard J. Dowdall
Attorney for Appellee

Subscribed and sworn to before me this 7th day of March, 1977, by RICHARD J. DOWDALL.

/s/ Ann K. Weaver
Notary Public

MY COMMISSION EXPIRES:

8-16-78

(Filed March 8, 1977)